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HAROLD B. WILLEY

No. 400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, all Appellees, except the United States of America and the Interstate Commerce Commission, move that the judgment of the District Court be affirmed on the ground that the appeal presents no substantial question warranting further argument.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1 (20) and 305 (g) are set forth in the Appendix, *infra*, pp. 9, 10.

STATEMENT

This is a direct appeal from a final judgment entered on April 11, 1955, by a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing this cause which sought to set aside an order of the Interstate Commerce Commission.

The order of the Commission authorized a transfer of control of certain motor carriers (the so-called Keeshin Lines) then in bankruptcy, and authorized the refinancing necessary to permit those motor carriers to reorganize and come out of bankruptcy. The report of the Commission appears at 60 M.C.C. 173. The judgment of the court below ordered that the cause be dismissed ". . . on the ground that plaintiffs are not parties in interest who may maintain this suit . . ." (Statement as to Jurisdiction, 25). The opinion of the district court is printed in the Statement as to Jurisdiction at page 20.

At the time the proceedings before the ICC were commenced, the Keeshin Lines had been in bankruptcy in proceedings under Chapter X in the United States District Court in Chicago for approximately eight years; several attempts at reorganization had failed. (60 M.C.C. 179). Fruehauf Trailer Company was a substantial creditor of the Keeshin Lines (60 M.C.C. 185) and consequently was interested in effecting a successful reorganization of those lines. The bankruptcy court approved a plan of reorganization, and John Ruan and C. & R. Trans., Inc., began the proceedings before the Commission to obtain the Commission's approval of the necessary financing and transfer of control of the bankrupt companies.

In these proceedings numerous railroads were permitted to intervene. It was their contention that, under the proposed refinancing, Fruehauf would be one of the persons in control of the reorganized Keeshin Lines, as control is defined in the Interstate Commerce Act, and that Frue-

hauf should therefore apply for authority to obtain control under Section 5 (2) of the Act (60 M.C.C. 198). Plaintiff's contention was based partially on the argument that two directors of Fruehauf then owned stock in the Detroit & Cleveland Navigation Company, which company owned thirty-seven per cent of the stock of Denver Chicago Trucking Company (60 M.C.C. 178), and that Fruehauf, therefore, controlled the Denver Chicago Trucking Company (60 M.C.C. 198); approval of the proposed transfer of control, it was argued, would improperly permit Fruehauf to acquire control of additional motor carriers, in violation of Section 5 (2) of the Act (60 M.C.C. 198). However, the Commission determined that under the proposed plan Fruehauf's relationship with these lines would be essentially that of a large creditor, not a person in control of the lines (60 M.C.C. 200-201). Simultaneously, the Commission approved the plan of reorganization (60 M.C.C. 173 et seq.).

The railroad intervenors then brought this proceeding in the district court to enjoin enforcement of the order approving the financing and transfer of control necessary to effectuate the plan of reorganization, alleging that the Commission erred in finding that Fruehauf would not be in control of the reorganized Keeshin Lines. The complaint named as defendants the United States, the Interstate Commerce Commission, John Ruan, C. & R. Trans., Inc., Fruehauf Trailer Co., and the trustees of the Keeshin Lines. With respect to the plaintiffs' interest in the matter, the complaint alleges simply that the plaintiff railroads compete with the Keeshin motor carriers throughout the areas served by those motor carriers. (Statement as to Jurisdiction, 38). The district court dismissed on the ground that plaintiff railroads "are not parties in interest who may maintain this suit" (Statement as to Jurisdiction, 25).

ARGUMENT

The question presented is whether the plaintiff railroads have standing to sue to set aside an order of the Commission authorizing a transfer of control of motor carriers, which order is alleged to be in violation of Section 5 (2) of the Act.

Plaintiffs' standing to sue must derive, if at all, from Section 205 (g) of the Act, which provides that orders of the Commission made under Part II of the Act, which regulates motor carriers in interstate commerce, ". . . shall be subject to the same right of relief in Court by any party in interest as is now provided in respect to orders of the Commission made under Part I" (p. 10, *infra*). This section incorporates by reference the "party in interest" provision of Section 1 (20) of the Act. *Alton Railroad Co.* v. *United States*, 315 U.S. 15. Thus only a "party in interest" may challenge an order of the Interstate Commerce Commission in the district court.

1. As the district court pointed out in its opinion (Statement as to Jurisdiction, 20), it is well established that a plaintiff, to qualify as a "party in interest," must allege that some definite legal right of the plaintiff is seriously threatened; or that the allegedly unauthorized action may directly and adversely affect the plaintiff's welfare; or that the plaintiff has some special interest which may be directly and materially affected. *Western Pacific California Railroad Co.* v. *Southern Pacific Co.*, 284 U.S. 47, 51-52; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, 311 U.S. 295, 303-304. It is not sufficient that the plaintiff have the interest of the ordinary citizen in enforcement of the law; he must have "a legal right or interest that will be injuriously affected by the order." *Moffat Tunnel League* v. *United States*, 289 U.S. 113, 119; *L. Singer & Sons* v. *Union Pacific Railroad Co.*, *supra*.

The most minute examination of the complaint in this case (Statement as to Jurisdiction, 26) will not disclose

any allegation of such a "legal right or interest." The complaint does not allege that the Commission's order will result in any actual or threatened injury to plaintiffs. Nor could plaintiffs in good faith offer any allegation of injury, for the Commission's order concerned only the internal affairs of the debtor motor carriers. The complaint alleges only that plaintiff railroads compete with the Keeshin motor carriers (Statement as to Jurisdiction, 38), and it is manifest that no "legal right or interest" of plaintiffs will be "injuriously affected" by the order transferring control of the Keeshin motor carriers.

It is significant that before the Commission plaintiff railroads did not even suggest that the proposed transfer of control would directly affect the railroads adversely, but merely that Fruehauf might be able at some undetermined future time to take over other motor carriers, tending to acquire a monopoly which would be contrary to the public interest (60 M.C.C. 198-199). This vague speculation serves to illustrate the remoteness of the interest of plaintiffs.

This Court has repeatedly held that "the mere fact that . . . [plaintiff] . . . was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order, in the absence of resulting actual or threatened legal injury to it." *E.g., Pittsburgh & West Virginia Railway Co.* v. *United States*, 281 U.S. 479, 486-487. Where, as in this case, "there is no suggestion that the order can affect [plaintiff] as a carrier," the plaintiff lacks standing to sue (*idem*).

2. Appellants, resolutely ignoring the opinion of the district court, continue to cite the same cases cited below, without answering the distinctions noted by the court.

Appellants rely principally on the case of *Alton Railroad Co.* v. *United States*, 314 U. S. 15 (Statement as to Jurisdiction, 10-13). That case involved the application of a motor carrier for a certificate of public convenience and

necessity under the "grandfather clause." The matter at issue was the right of the motor carrier to operate, and thus whether the plaintiff railroad would be confronted with the competition of this motor carrier. The Commission's order granted the operating rights to the motor carrier, and authorized operating rights to all points in certain states, even though the motor carrier's previous operations had been limited to only a few points in those states. While the Court held that the competing railroads had standing to sue in the *Alton* case, it is apparent that that case involved the right of a motor carrier to conduct additional operations in competition with the railroads, and not merely a transfer of control of a motor carrier with established operating rights.

Nevertheless, from that case appellants argue that competition between railroads and motor carriers, or service to the same points by railroads and motor carriers, "establishes a status of 'party in interest' " (Statement as to Jurisdiction, 12); and that, if competition exists, it is not necessary to allege or prove financial loss or other injury (Statement as to Jurisdiction, 11). As the Court below pointed out (Statement as to Jurisdiction, 23), neither reason nor authority would permit the application of such a rule to an order that affects only the internal management or control of a competing carrier. A railroad is properly entitled to challenge an order authorizing new motor carrier competition, but it is not entitled to sue to enjoin enforcement of an order dealing only with the internal affairs of a competing motor carrier.

As we have indicated above, the present case does not involve the establishment of motor carrier operations. It involves only a transfer of control of previously established motor carrier operations. The Commission's order in this case affected only the internal management and control of the Keeshin Lines, a matter in which competing railroads have no direct interest.

Appellants also rely on the case of *Baltimore & Ohio Railroad Co.* v. *United States,* 264 U. S. 258 (Statement as to Jurisdiction, 9). In that case, certain railroads brought suit to set aside a Commission order which authorized the New York Central Railroad to acquire control of certain terminal railroads. The plaintiff railroads had been served impartially by the terminal railroads before the New York Central acquired control of them, but were thereafter subordinated to the preferential interests of the New York Central. The plaintiffs were competitors of the New York Central and their loss of the impartial use of the terminal railroads resulted in an annual loss to the plaintiffs of $10,000,000.00. This Court observed that the loss was an "injury inflicted by denying to the plaintiffs equality of treatment," and held that "the plaintiffs, being competitors . . . and users of the terminal railroads theretofore neutral" had standing to sue. 264 U. S. at 267.

There is no similarity between the *Baltimore & Ohio* case and the present case. Plaintiffs in this case are not "users" of the Keeshin Lines who have been denied equality of treatment in the use of the motor carriers involved. Nor have plaintiffs alleged any financial loss whatever. There is nothing in the complaint to show that plaintiffs are in any way affected by the internal reorganization of the Keeshin Lines.

3. Appellants' reliance on the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding paras. 1, 301, 901 and 1001, is without merit (Statement as to Jurisdiction, 16-17). The nature of this argument is not entirely clear, but it cannot seriously be suggested that the National Transportation Policy confers on a person not injured in any way a right to obtain judicial review of an order of the Commission dealing only with the internal reorganization of bankrupt motor carriers.

4. Equally without merit is appellants' reliance on cases involving other administrative agencies, and on the Admin-

istrative Procedure Act, 5 U.S.C. 1001 et seq. (Statement as to Jurisdiction, 18-19). None of the cases cited holds that a plaintiff, albeit a competitor, may challenge an administrative order which does not injure the plaintiff at all. And the Administrative Procedure Act, which appellants refrain from quoting, contemplates judicial review only at the instance of "any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any revelant statute . . ." 5 U.S.C. 1009 (a).

CONCLUSION

The complaint does not allege that appellants will suffer any financial loss. Nor does it allege facts showing that any definite legal right of appellants is threatened, or that the Commission's order will directly and adversely affect appellants' welfare. The Statement as to Jurisdiction simply ignores, rather than challenges, the points made by the district court in holding that appellants lack standing to sue. It is respectfully submitted that the decision below is correct, and that this appeal does not present a substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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APPENDIX

Statutes Involved

INTERSTATE COMMERCE ACT, Section 1 (20), 49 U.S.C. 1 (20):

(20) Issuance of certificate by Commission—Unlawful extension or abandonment of lines.—The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any Court of competent jurisdiction at the suit of the United States, the Commission, or any commission or regulating body of the State or States affected, or *any party in interest*; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. (Italics added.)

INTERSTATE COMMERCE ACT, Section 205 (g), 49 U.S.C. 305 (g):

(g) Court review of Commission's orders—Compelling Commission to take jurisdiction. Any final order made

under this part shall be subject to the same right of relief in court *by any party in interest* as is now provided in respect to orders of the Commission made under part I. Provided, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction. (Italics added.)

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

BRIEF OPPOSING MOTIONS TO AFFIRM

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